

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

KELLEY DENK,

Plaintiff,

vs.

Case No. 2004-4281-NH

JEFFREY C. MARDEROSIAN, D.D.S.
and PROFESSIONAL ENDODONTICS,
P.C., a Michigan professional corporation,

Defendants.

OPINION AND ORDER

Defendant has filed a motion for judgment notwithstanding the verdict or, alternatively, for a new trial.

This matter arises from injuries sustained by plaintiff when her dentist, defendant Marderosian, negligently burned her lip with a "neosonic device" while performing an apicoectomy. Following trial, the jury issued a verdict in favor of plaintiff, awarding plaintiff \$4,367.00 in economic damages, \$150,000.00 in non-economic damages, and \$1,500.00 for future economic damages. This Court entered the judgment in this matter on March 31, 2006.

MCR 2.610 provides for motions for judgment notwithstanding the verdict. A motion for judgment notwithstanding the verdict should be granted only when, viewing the evidence and all legitimate inferences in a light most favorable to the nonmoving party, there remain no issues of material fact upon which reasonable minds could differ. *Cipri v Bellingham Frozen Foods, Inc.*, 235 Mich App 1, 14; 596 NW2d 620 (1999). If reasonable jurors could have honestly reached different conclusions, however, the jury verdict must stand. *Ewing v City of Detroit*, 252 Mich



App 149, 158; 651 NW2d 780 (2002), quoting *Morinelli v Provident Life and Accident Ins Co*, 242 Mich App 255, 260-261; 617 NW2d 777 (2000). A trial court's decision with regard to a motion for JNOV is reviewed de novo. *Id.*

A trial court's decision regarding a motion for new trial is reviewed for abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). A trial court's determination that the verdict was not against the great weight of the evidence is given substantial deference. *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003). A reviewing court will not substitute its judgment for that of the fact-finder unless the evidence weighs so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Id.*

In support of their motion, defendants argue that plaintiff failed to satisfy her burden of proof, since the testimony of her expert witness was inconsistent with the testimony of the sole eyewitness to the incident giving rise to this matter. Next, defendants claim that they were precluded from presenting an alternative theory of proximate cause due to inconsistent rulings by this Court. Defendants also allege that the jury instructions in this matter were improper and were inconsistent with the Court's earlier rulings in the case. Finally, defendants allege that plaintiff's attorney engaged in misconduct by repeatedly referring to proximate cause in his closing arguments.

In response, plaintiff claims that the testimony of her expert witness was properly introduced. Next, plaintiff notes that this Court's rulings regarding proximate cause were consistent. Specifically, plaintiff points out that this Court previously held that defendants could present evidence, if any, supporting their contention that the neosonic instrument was not the cause of plaintiff's injury. Plaintiff claims that defendants simply failed to produce any such

evidence. Plaintiff next claims that defendants did not object to the jury instructions in this matter, and claims that the instructions were substantively proper. Finally, plaintiff argues that defendants did not raise any objections during the closing argument. Alternatively, plaintiff claims that there is no evidence that any comments her attorney may have made indicate a deliberate course of conduct warranting judgment notwithstanding the verdict or a new trial.

First, the Court disagrees with defendants' assertion that plaintiff failed to sustain her burden of proof. An expert witness' "opinion is objectionable where it is based on assumptions that are not in accord with the established facts." *Badalamenti v William Beaumont Hospital – Troy*, 237 Mich App 278, 286; 602 NW2d 854 (2001) (citation omitted). For example, "[t]his is true where an expert witness' testimony is inconsistent with the testimony of a witness who personally observed the event in question, and the expert is unable to reconcile his inconsistent testimony other than by disparaging the witness' power of observation." *Id.*

Defendants mistakenly rely on *Badalamenti* to abrogate the testimony of plaintiff's expert witness. Unlike the expert in *Badalamenti*, plaintiff's expert did not base his opinion on assumptions which were not in accord with established facts. Rather, plaintiff's expert based his opinion on his experience as medical professional, who had performed thousands of procedures using a neosonic device, and who was therefore intimately familiar with the device's operation. Further, there were no "established facts" in the case at bar which plaintiff's expert contradicted.

The Court now turns to defendants' contention that this Court made inconsistent rulings regarding proximate cause, thereby precluding them from presenting an alternative theory of this case. Prior to trial, plaintiff filed a motion in limine requesting the Court to preclude evidence that defendants' "neosonic device" malfunctioned since defendants could not produce the device at issue. The Court denied this request, since a plaintiff cannot use procedural rules as "a sword

to eviscerate a defense of one of the elements comprising plaintiff's burden of proof." *Veltman v Detroit Edison*, 261 Mich App 685, 693; 683 NW2d 707 (2004). Therefore, the Court properly refused to grant plaintiff an irrebuttable adverse presumption based on the loss of material evidence. *Ward v Consolidated Rail Corp*, 472 Mich 77; 693 NW2d 366 (2005).

However, the Court recognized that an adverse inference could be drawn from the loss of the device against defendants, since they were the spoliators of the evidence. *Lagalo v Allied Corp*, 233 Mich App 514, 520; 592 NW2d 786 (1999). This presumption shifted the burden of producing evidence regarding the malfunction of the missing neosonic device to defendants. However, defendants failed to present any evidence suggesting that the neosonic device malfunctioned in such a way that the handle burned plaintiff's lip.¹ The Court therefore determined that defendants failed to satisfy their burden of production which had shifted to them as spoliators of the evidence. Since defendants had failed to carry their burden of establishing their alternative theory of the case, the Court properly granted plaintiff's motion for a directed verdict on the affirmative defense of malfunction or defect.

Defendants' contention that the Court granted a directed verdict on the issue of proximate cause as well is incorrect. Immediately following this Court's delivery of the jury instructions, the parties acknowledged, on the record, "that in chambers we decided that the Court was going to give the – proximate cause issue to the jury." This statement, placed on the record, clarified the Court's earlier statements regarding proximate cause in connection with plaintiff's motion for a directed verdict. Therefore, contrary to defendants' argument, the Court did not grant a directed verdict as to proximate cause.

¹ Defendants' theory was that the handle of the neosonic device burned plaintiff's lip, while plaintiff argued that the tip of the device burned her lip.

Next, the Court shall address defendants' argument that the jury instructions were improper and inconsistent with the Court's previous decisions. A party must object to proposed jury instructions on the record in order to preserve the issue for appellate review. MCR 2.516(C); and see, e.g., *Janda v City of Detroit*, 175 Mich App 120, 127; 437 NW2d 326 (1989). In the present case, the parties worked in conjunction with the Court in preparing the jury instructions. Defendants' only objection to the jury instructions concerned the Court's instruction regarding *res ipsa loquitor*. Therefore, defendants are precluded from arguing that the Court failed to adequately instruct the jury concerning proximate cause at this time.

Defendants' objection to the Court's instruction concerning *res ipsa loquitor* is substantively unavailing. An instruction concerning *res ipsa loquitor* should not be given in "an action of malpractice where it is obvious that the professional care exercised in a procedure, treatment, or operation is not a matter of common knowledge among laymen and it cannot be said that injury results only where there has been negligence present." *Haase v DePree*, 3 Mich App 337, 346; 142 NW2d 486 (1966). However, an instruction on *res ipsa loquitor* should be given if there is expert testimony that the injury does not ordinarily occur without negligence. SJ12d 30.05; and see *Jones v Porretta*, 428 Mich 132, 157; 405 NW2d 863 (1987). In the case at bar, plaintiff's expert witness testified that an injury of the type suffered by plaintiff does not normally occur without negligence. Therefore, the Court's instruction on *res ipsa loquitor* was substantively correct.

Lastly, the Court turns to defendants' assertion that they are entitled to judgment notwithstanding the verdict or a new trial because of attorney misconduct. "A lawyer's comments will usually not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to

deflect the jury's attention from the issues involved and had a controlling influence on the verdict." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 191-192; 600 NW2d 129 (1999).

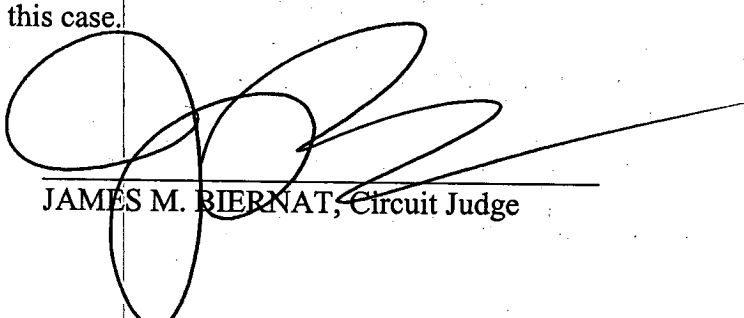
The Court believes that the comments made by plaintiff's counsel concerning proximate cause during closing arguments did not suggest a deliberate course of conduct aimed at undermining the fairness and impartiality of the trial. Contrary to defendants' contention, the comments did not suggest that defendants had the burden of proof. Rather, plaintiff's attorney specifically stated that "for plaintiff to carry . . . her burden of proof on the scales of justice, we have to tip [them] ever, ever so slightly in our favor." Defendants' attorney's objection was directed at subsequent comments which, in context, clearly alluded to defendants' failure to establish their affirmative defense that the neosonic device had malfunctioned, causing the handle to burn plaintiff's lip. The Court had previously issued a directed verdict as to this issue because defendants had failed to proffer evidence or testimony supporting this affirmative defense. As such, the Court does not believe that plaintiff's attorney's closing argument deflected the jury's attention from the issues involved, or had a controlling influence on the verdict.

For the reasons set forth above, defendants' motion for judgment notwithstanding the verdict or a new trial is DENIED. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

JMB/kmv

DATED: June 30, 2006



JAMES M. BIERNAT, Circuit Judge

cc: Barbara A. Patek, Attorney at Law

Ronald DeNardis, Attorney at Law

Keith P. Felty, Attorney at Law

Gary N. Felty, Attorney at Law